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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRAD RAFFENSPERGER, ET AL.,	:	
	:	
DEFENDANTS.	:	

TRANSCRIPT OF TELEPHONE CONFERENCE PROCEEDINGS

BEFORE THE HONORABLE AMY TOTENBERG

UNITED STATES DISTRICT SENIOR JUDGE

SEPTEMBER 30, 2022

10:42 A.M.

MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; September 30, 2022.)

THE COURT: Good morning. This is -- I'm sorry. We must have had a miscommunication. Because this morning when I saw how much had been filed, I had written the office. And obviously my email must have fallen out of the system because I really couldn't then begin until 10:45.

So I have not read everything. And that is the best I can do. I have read some of what you-all submitted. So that is the best I can do under the circumstances. You'll have to repeat some things.

Mr. Martin, can you tell me who is present on the phone call? And this is Curling, et al. v. Raffensperger, Case Number 17-CV-2989.

COURTROOM DEPUTY CLERK: Yes, ma'am. For the State of Georgia, we have Mr. Tyson, Mr. Russo, Mr. Denton, Mr. Jacoutot, and Mr. Pico Prats.

THE COURT: Okay.

COURTROOM DEPUTY CLERK: For the Curling plaintiffs, we have Mr. Cross and Mr. Adam Sparks. For the Coalition, Mr. Brown.

Has anyone from Fulton County joined in?

It appears we don't have anyone from Fulton County.

THE COURT: All right. Well, I have read the letters. I have read one of the submissions, and that is it.

1 So I'm sorry.

2 So tell me -- are you -- from what I can tell from
3 the correspondence, there are some issues about whether the --
4 about a privilege log and I don't know what else there is at
5 this point.

6 MR. CROSS: Your Honor, this is David Cross for
7 Curling plaintiffs.

8 The -- I don't know if you had a chance to read the
9 email I sent in and --

10 THE COURT: I did. I read that.

11 MR. CROSS: That is really sort of the gist of it. I
12 think just to kind of net it out, our understanding is that
13 there are -- and let's take a step back.

14 It seems like there was just a different
15 understanding that the parties had in coming out of one of the
16 prior hearings back to June where I gather from the discussion
17 we had this week the State defendants came away with the
18 understanding that Your Honor was directing them that the only
19 thing that they had to either produce or log was this handful
20 of reports that they had discussed in one of those hearings.

21 That was not our understanding. Our understanding
22 was that they had raised those specific documents as a handful
23 of documents they had identified. Your Honor directed them to
24 either produce or log those, which they did.

25 But we have always been seeking the broader

1 collection of documents related to any investigation by the
2 State into any unauthorized access, obviously in particular in
3 Coffee County. And we have never understood Your Honor to
4 resolve that.

5 And, in fact, our understanding was part of the
6 purpose of the briefing that you ordered in July on the
7 investigative privilege was to address that broader set of
8 documents that had to deal with that. And our position remains
9 that they have not complied with the requirements of the
10 investigative privilege.

11 I'm happy to walk through those again. I mean, the
12 short of it is in the *Navarro* case that we cite from the Middle
13 District of Georgia is directly on point where it was the same
14 thing. The State came in, broadly asserted investigative
15 privilege over documents related to an ongoing criminal
16 investigation, and the court identified the specific
17 requirements. None of those requirements are met here.
18 Literally not one, Your Honor. Not one requirement is met.
19 And the court said that resolves it. That is the end of it.

20 And so that is our position here, having failed to
21 meet those requirements. And, again, I'm happy to talk through
22 them, if Your Honor needs to hear them. They need to produce
23 any and all documents that relate to any investigation and to
24 unauthorized access.

25 The last point I'll make, Your Honor, just in

1 response to the filing that I saw this morning, the State seems
2 to be arguing that we don't need the documents because we have
3 a 30(b)(6) deposition coming up. And I guess a couple of quick
4 thoughts on that.

5 One, the prior depositions had not been particularly
6 enlightening, as Your Honor found before. Certainly we're
7 hoping the next deposition is more fruitful in terms of
8 learning information.

9 But the second is, Your Honor, depositions are not a
10 substitute for document discovery. That is never the case.
11 And, in fact, the reason why document discovery typically
12 precedes depositions is because the documents themselves are
13 critical exhibits for the deposition testimony so that we can
14 come into that deposition, you know, already with some base
15 level information about the facts and to be able to use
16 documents to lay foundation for those as exhibits going into
17 the merits of the case at some point.

18 And so I think they are setting up a dichotomy that
19 has never been recognized by any court that I can think of as
20 document discovery testimony. One precedes the other, and the
21 documents should be produced, again in particular in a
22 situation where you just have not gotten discovery from the
23 other side despite numerous 30(b)(6) depositions on this topic.

24 **(Extraneous background noise)**

25 MR. CROSS: -- information. And to be clear, this is

1 not a criticism of the counsel on the other side. The reality
2 is that the Secretary of State's office and the Secretary
3 himself have provided very different narratives on what they
4 learned and when. And getting the documents as opposed to just
5 relying on the 30(b)(6) deponent is a critical part for us to
6 make sure we get the full set of facts on what happened or when
7 and what didn't happen.

8 And the last point is, you know, we deposed
9 Mr. Sinners, who is now the director of communications -- the
10 days just run together. It was sometime this week in Atlanta.
11 And, you know, even he, who is the third most senior official
12 in the office, who reports directly to Mr. Sterling and who
13 then reports to the Secretary -- even he testified under oath
14 he does not know basic details about any investigation. He
15 does not know even when the Secretary's office learned of the
16 allegations regarding Coffee County.

17 And, again, there have been, you know,
18 representations even recently according to the station the
19 Secretary did the interview with -- you know, the Secretary
20 himself first said they learned about it immediately after the
21 breach. Then one of his aides jumped in and said no, no, it
22 was in May of 2021, which would be consistent with the email
23 from James Barnes to Chris Harvey that we talked about before.

24 And then later they were told by someone it sounds
25 like in the Secretary's office that no, we didn't learn about

1 it until July of this year. But that is not consistent with at
2 least having learned about it in the deposition of Mr. Sterling
3 in February. And there have been different representations on
4 when investigations were opening and what has happened with
5 them. So --

6 THE COURT: Let me just say: One of the things is --
7 let me just stop you for a second. This is something very
8 different at the moment. So I'm just trying to switch gears.

9 I really -- reading everything -- sort of running
10 through reading all this, I'm not 100 percent sure. Are you
11 asking for a formal invocation of the privilege? Are you
12 asking for -- saying it is not proper here, or are you asking
13 for documents? Are you asking for the full investigative file
14 even though as you have recognized before there was now at
15 least a criminal investigation proceeding as well?

16 That is what I'm -- and when we had our conversation,
17 I thought, in August, there seemed to be a recognition on your
18 part that the posture of the case had changed -- had changed
19 some because of the information that was provided via counsel
20 from the chair of the board. And so I'm just -- I'm not clear
21 whether you are asking for a better log or you're looking for
22 the documents or what.

23 MR. CROSS: I'm sorry, Your Honor.

24 **(Unintelligible cross-talk)**

25 THE COURT: All right.

1 MR. CROSS: Sorry. My apologies. Let me clarify
2 that.

3 So what we are seeking -- let me put it this way.
4 What we understand is that there is now -- there is, in fact,
5 now an ongoing investigation that was opened at the direction
6 of the SEB, Judge Duffey in coordination with the Secretary's
7 office, and the GBI sometime in August. It sounds like that
8 was maybe mid-August.

9 We are not from my group -- I don't know if Bruce and
10 I have talked about it in this level of detail. But my
11 understanding of where are is we are not seeking documents with
12 respect to that investigation. That is an ongoing criminal
13 investigation. We're not seeking anything with respect to that
14 investigation that would be properly covered by the
15 investigative privilege. And certainly there would be some
16 documents that are.

17 But before -- going back before August, which is the
18 earliest indication we have that Judge Duffey as the head of
19 the SEB opened an investigation, which is a requirement for the
20 investigative privilege -- there is no evidence that meets any
21 of the elements of the investigative privilege going back
22 before that.

23 And so what we're saying is whatever documents exist
24 either with the SEB or with the Secretary of State's office
25 involving an investigation into unauthorized access for the

1 voting system in Coffee County or elsewhere -- the call with
2 Ben Cotton says he looked at this for Fulton County -- those
3 are the documents we want because there again has not been
4 evidence of an ongoing investigation or any investigation going
5 back before that time before the August time period and
6 certainly not anything that meets the rigid requirements of
7 privilege.

8 And on that, Your Honor, again it has to be asserted
9 by the head of the office. And it also has to be asserted as
10 to each document. And the head of the office has to testify
11 him or herself that they individually have reviewed each
12 document and identified the specific portions that fall within
13 that narrow scope that protects things like methods for the
14 investigative privilege. And we don't have that at all.

15 Does that answer your question?

16 THE COURT: Okay. All right. So I know we may be
17 retreading ground here.

18 But, Mr. Tyson, are you speaking on behalf of the
19 State, or is somebody else?

20 MR. TYSON: Yes, Your Honor. Bryan Tyson. I will --
21 I'll start, and then if Mr. Russo has something to add he can.

22 THE COURT: All right. So just sort of -- just to
23 start with where we just ended up.

24 MR. TYSON: Sure.

25 THE COURT: You know, looking at *Navarro*, it doesn't

1 appear that I do have a formal invocation of the privilege in
2 front of me in a way that Navarro speaks about it. Maybe you
3 think Navarro is not really controlling law. But it does refer
4 to the binding Fifth Circuit case back to '69 binding now in
5 the Eleventh Circuit. So talk to me about that.

6 MR. TYSON: Yes, Your Honor. So I'll begin here, and
7 Mr. Russo can jump in.

8 I think that from our perspective -- and I understand
9 this is probably where we have a difference of opinion with
10 plaintiffs -- the investigation that the Secretary's office
11 undertakes is undertaken by law enforcement officers on behalf
12 of the Secretary. So we don't see the same distinction between
13 GBI and the Secretary's investigation that Mr. Cross is
14 explaining here.

15 So from the Secretary's perspective when the matter
16 was reopened, that is a matter that the Secretary's
17 investigators can bring to the SEB that can result in a
18 referral for a criminal prosecution carried out by POST
19 certified law enforcement officers.

20 So from our perspective, I don't see a distinction
21 between the GBI investigation and the Secretary's
22 investigation. And our issue there is we have an active
23 criminal investigation happening. We have the -- I mean, we
24 have submitted, I think, everything we have that is public on
25 that so far. But anything further would be documents that are

1 part of a criminal investigation so -- or potential criminal
2 investigation, I guess I should say.

3 So if the request is go get whatever documents the
4 Secretary has, log those, and assert the privilege as to those,
5 I think that is a different conversation than, you know, we
6 want to have documents that are part of an active investigation
7 that is still underway by the Secretary, State Election Board,
8 and GBI.

9 THE COURT: Well, obviously Mr. Cross needs to speak
10 for himself about that. But as I understood it though, what he
11 in part was saying was that there was an -- to the extent there
12 was an investigation before this matter was referred to -- in
13 some ways referred for a criminal investigation that he
14 believes that it is -- it wouldn't be privileged but to the
15 extent it is privileged that you would have to properly invoke
16 the privilege.

17 Is that your position, Mr. Cross, or have I misstated
18 it?

19 MR. CROSS: Yes, Your Honor. You captured it well.

20 MR. TYSON: So I guess that helps me -- this is Bryan
21 Tyson. I guess that helps me understand kind of what is being
22 asked for at least. I think we would still have a relevance
23 issue in terms of kind of scope here just because I'm a little
24 bit at a loss of we know an access happened of the Coffee
25 County equipment. I'm unclear what other documents related to

1 the investigation into that access have to do with the
2 plaintiffs' claims.

3 So I mean, if they want to impeach us, I guess that
4 is what the idea is they want to show that there was no
5 investigation. I guess I'm just a little bit at a loss to
6 understand kind of the relevance of all these additional
7 documents when we have established that there was unauthorized
8 access and I guess the point that is relevant for the
9 plaintiffs' claims here.

10 THE COURT: Well, one thing I heard him say was that
11 they were asking for any other also investigations into -- that
12 were conducted as to access issues, whether it is Coffee County
13 or elsewhere.

14 Mr. Cross, was that your request?

15 MR. CROSS: That is certainly part of it, Your Honor,
16 yeah.

17 THE COURT: And, secondly, that they were asking for
18 if you weren't -- I think -- as I understand their position,
19 they think it is relevant if it was ignored for -- for some
20 period of time and was not properly attended to from their
21 perspective and that it only genuinely started an investigation
22 many months after the events that occurred and so that that
23 would be relevant as well from their perspective.

24 And I'll leave it to Mr. Cross to articulate why you
25 think that that is relevant, the lack of -- if there was

1 nothing that occurred in those months.

2 MR. CROSS: Yes, Your Honor. One of the key
3 defenses -- and, again, it may be the only really remaining
4 defense for the State -- in this case is when we point out the
5 vulnerabilities of the system that have been validated is to
6 say that, well, no one can get access to the system and if they
7 did they, of course, should be held accountable and that
8 accountability is what is supposed to enforce the protected
9 mechanisms that are in place. Right?

10 The idea being we put walls in place. No one can get
11 beyond those walls. But in the unlikely event they ever did,
12 it would be criminally prosecuted. They would be held
13 accountable. And that exposure is what is meant to help sort
14 of enforce those laws. Right? The idea that no one is going
15 to try to breach the law because they would face severe
16 consequences if they did.

17 That has been a real focus of the defense in this
18 case since Dr. Halderman's July 2021 report. And so this is
19 relevant to us because it refutes that defense in our mind to
20 show that, one, the laws are not what has been represented and,
21 two, when there has been, I think, a breach that I think we
22 would probably all agree that no one ever imagined would occur
23 to be now a year and a half later and no one has been held
24 accountable and there are open questions about what was
25 investigated and when that, we would submit, undermines this

1 notion that there is a strong disincentive for folks not to
2 breach whatever walls might be in place, which goes to the
3 security and reliability of the system.

4 And the other point I'll make, Your Honor, is the
5 other reason why these documents are relevant to us is there
6 may be additional details in there that we don't yet have. As
7 Bryan points out, yes, we know there was an access. But, for
8 example, in the Secretary's interview, as I mentioned in my
9 email, he indicated they learned at some point that Ms. Hampton
10 had shared her password to a third-party company. We're not
11 sure what that is. I hazard at a guess. We have other
12 guesses.

13 He also mentioned the folks testifying before a grand
14 jury or at least one of them. And so there is -- we suspect
15 there may be facts -- because, again, we're not looking for the
16 methods. There may be factual information that the Secretary's
17 office has uncovered that has not yet been disclosed to us that
18 bears on the scope of the breach, how it happened, and the full
19 risk it presents.

20 MR. TYSON: Your Honor, this is Bryan Tyson.

21 And I guess maybe I'm a little bit at a loss still
22 about why is a document needed if we're not looking for sources
23 and methods but we are looking for facts.

24 The discussion of the Secretary's interview -- I
25 think that can very easily be addressed in 30(b)(6) testimony

1 from -- that is going to be happening next week explaining what
2 is going on there.

3 Mr. Sinners explained some of the pieces of kind of
4 what happened with that in his deposition. But I think that at
5 the end of the day, I'm not sure how we're going to distinguish
6 between, you know, sources and methods in terms of what
7 decisions the Secretary's office made about how they went about
8 investigating this versus, you know, not revealing kind of
9 those methods as we go along.

10 And I mean, maybe the answer is we log it and assert
11 it. But we have a deposition coming up on Tuesday. And so I'm
12 just trying to think through practically speaking if we log
13 every document and we say, hey, these are all documents that
14 show sources and methods and we show that there are documents
15 but we don't want to reveal kind of what they show because we
16 believe that would compromise the investigation, I think we're
17 kind of still back at the same point.

18 And I'm just trying to think logistically what do we
19 do with the deposition in a 30(b)(6). I think that the
20 questions that Mr. Cross has raised can all be asked in the
21 course of the 30(b)(6). And we have already said he is going
22 to be able to ask questions about, you know, when the
23 investigation began and kind of what was happening -- what the
24 initial things were happening, the factual things that he wants
25 to find out.

1 I just don't see why we need more than a 30(b)(6) to
2 get at those pieces if we truly don't need to -- if the goal
3 isn't to look at sources and methods while we're undergoing
4 this process.

5 THE COURT: Okay. Mr. Cross, what do you mean by
6 sources and methods?

7 MR. CROSS: Well, it is a good question, Your Honor.
8 And I -- unfortunately I think it is a better question for the
9 State. And it is why, I think, the *Navarro* and the
10 *Polypropylene* cases are on point.

11 The obligation is for the head of the department to
12 go through each individual document and determine for him or
13 herself what would be sensitive information like sources or
14 methods. Right?

15 So it might be something like if you had an
16 undercover agent -- obviously you don't want that disclosed --
17 or if you have a technical method you are using to gather
18 information, you might have a bug in place, any variety of
19 sensitive methods.

20 It would not be however we sent an investigator down
21 and the investigator spoke with people. That is not a
22 sensitive proprietary method. And that is why it is incumbent
23 upon the head of the department to do that review individually.

24 And I would say, Your Honor, we have gone through
25 multiple rounds of briefs. We have dealt with this for months.

1 In the *Navarro* case, the court resolved this by simply saying,
2 you had an opportunity to do what you needed to do. You didn't
3 do it. Produce all the documents. And I think that is really
4 where we are.

5 But the other point on this, Your Honor, that is also
6 getting lost is the investigative privilege is about public
7 disclosure. The courts are very clear on this. We have a
8 protective order in this case. There has never been throughout
9 the entirety of this case any leak of any information
10 designated confidential that I'm aware of. And so there is no
11 reason to think that that protective order is not sufficient.

12 And so really the investigative privilege is the
13 wrong place for us to be at because no one is suggesting public
14 disclosure. We're talking about disclosure only to counsel or
15 clients, depending on the nature of it, and experts that would
16 then get used in a deposition with the State's own 30(b)(6)
17 witness.

18 And so we are kind of in the wrong framework to even
19 be talking about this privilege because it is about public
20 disclosure, and that is not what we're asking for. But at the
21 very least, the elements have not been met.

22 MR. TYSON: Your Honor, this is Bryan Tyson. On
23 sources and methods, I think this is where we get to the not
24 needing the document versus asking questions.

25 THE COURT: I'm sorry. I didn't hear the last part.

1 That is where we get to --

2 MR. TYSON: I'm sorry. Get to not needing documents
3 versus asking the questions in the deposition. Because, for
4 example, one of the things we heard from the plaintiffs early
5 on was, well, nobody has interviewed anybody in Coffee County.
6 So therefore we know there is no investigation.

7 Well, the Secretary's investigator, then the
8 Secretary's office's selection of kind of what order they
9 proceed in with an investigation is in our mind a disclosure of
10 the particular methods they are using.

11 We have witnesses to -- at least potential witnesses
12 to what at least the scope and communications with other people
13 in Coffee County communicating with the plaintiffs in this
14 case -- the Coalition plaintiffs.

15 And so the Secretary's selection of the method of
16 investigation, I don't see how that is different than kind of
17 getting in a source and methods. If Mr. Cross wants to ask in
18 the 30(b)(6) what steps has the Secretary's office taken to
19 investigate and what dates did those occur, I think those are
20 questions he can ask and that we can answer at a level that is
21 going to be enough information.

22 I'm not sure we can get much beyond that though
23 into -- without getting into particular methods by which the
24 Secretary's office and his investigators chose to investigate
25 the case and move this thing along.

1 So as to other investigations too, I just wanted to
2 make sure the Court was aware that Judge Duffey announced
3 yesterday that the SEB has opened an investigation into
4 contacts between SullivanStrickler and Spalding County. That
5 is a new investigation that is just beginning and a separate
6 investigation of SullivanStrickler generally to look at other
7 potential counties they may have had contact with.

8 So this is an ongoing active process. It is not like
9 there is some sort of static universe that we're in right now.

10 THE COURT: And were there any -- any other access
11 ones that there was -- that information also requested --
12 information as to any other investigations into access to the
13 election system?

14 MR. TYSON: The equipment? Yes, Your Honor. Bryan
15 Tyson again.

16 I think that what we did before -- remember the
17 investigative summaries that we produced were related to --

18 THE COURT: Right.

19 MR. TYSON: -- anything that had to do with election
20 security. I don't recall -- and Mr. -- I think Mr. Miller is
21 able to join us. Mr. Miller and Mr. Russo may be able to
22 correct me.

23 But I don't recall any other investigations as to
24 equipment access of the nature of Coffee County. There might
25 have been an investigation into, you know, somebody left a door

1 unlocked. And we've had situations before where somebody had a
2 Poll Pad in a vehicle or something like that years ago. It
3 wasn't a Poll Pad. It was an old pollbook.

4 But I don't recall any others of the nature of an
5 allegation to access the equipment like in Coffee County with
6 the exception of the potential access in Spalding, which we
7 believe didn't occur. But that is to what Judge Duffey
8 announced yesterday the SEB is investigating.

9 MR. MILLER: Your Honor, this is Carey Miller. I'm
10 sorry for joining late here.

11 THE COURT: That's all right. I did too.

12 MR. MILLER: But the discovery seems to be the topic
13 de jure for me today.

14 But Mr. Tyson's description is accurate. You know,
15 when we reviewed the investigative reports and summaries, we
16 took a pretty expansive view of relevance to try and capture
17 any similarly relevant documents. So the plaintiffs have the
18 investigative summaries for all those matters that indicate
19 kind of in broader strokes what the topic is of a particular
20 investigation.

21 But Mr. Tyson is correct that the Coffee County
22 situation is certainly unique.

23 MR. CROSS: Your Honor, this is David Cross. Just a
24 couple of quick thoughts.

25 One, Mr. Tyson is saying that we can ask these

1 questions and get the answers in a 30(b)(6), including asking
2 what they did to investigate. But that means that it is not
3 privileged. So if we can get it in testimony, we also should
4 get it in documents. But we should get the documents first for
5 the reason I already articulated.

6 And then, Your Honor, the idea that the order in
7 which they speak with witnesses, that that would be a
8 privileged source, there is no evidence for that. Mr. Tyson is
9 saying it doesn't satisfy the requirements under *Navarro* or
10 *Polypropylene* -- that is a hard word for me -- in any of the
11 other cases that we have seen on the investigative privilege.
12 And they have had an opportunity to put that forward.

13 And I will say from a common sense standpoint that
14 just doesn't sound right. And a key point is that everyone
15 involved has said that they were not investigated -- I'm
16 sorry -- that they were not interviewed. And so it seems like
17 it is less an issue of the order and whether they did it and
18 when.

19 But there certainly is no factual predicate, I think,
20 for the Court to find that the order in which witnesses are
21 spoken with by the investigator or when -- that that is
22 privileged.

23 MR. TYSON: Your Honor, this is Bryan Tyson. Just to
24 clarify -- Mr. Cross may have misunderstood what I was saying.
25 What I'm saying is questions like, you know, what the State was

1 doing at a general level are not getting into sources and
2 methods and those kinds of things.

3 This -- the issue is -- so, for example, who did the
4 State speak with, I think, is a question you could ask. How
5 did you determine that person was somebody you wanted to speak
6 with, that gets into your sources and methods.

7 So I think that from our perspective the documents
8 are going to show those types of details. The Secretary's
9 office isn't revealing anything that is privileged by
10 explaining or answering those questions in a general level.

11 So that is, I think, an important distinction here
12 and why I think the deposition makes more sense than the
13 documents, especially given the timeline, you know, Friday
14 before a Tuesday deposition.

15 MR. CROSS: Your Honor --

16 THE COURT: Go ahead.

17 MR. CROSS: Sorry, Your Honor. I don't think
18 anybody -- I'm sorry. Obviously you picked the people you went
19 about picking. I think it is really just understanding what
20 they did.

21 But to the document point -- I think it is easy to
22 envision a concrete example. Right? When investigators
23 conduct interviews, in every experience I've ever had, they
24 take notes. Those notes are going to be largely factual. Now,
25 there may be some discrete aspect in there where an

1 investigator writes down, you know, here is my method -- my
2 sensitive method for how I'm doing something.

3 But the document itself is going to have factual
4 information. They are going to come back, and they are going
5 to prepare reports on what they have done. That is all fact
6 information that we are entitled to.

7 Again, it is -- I hate to keep harping on it. But it
8 is why the courts have approached this issue in the way they
9 have. It is a recognition that very little information is
10 going to be sensitive. It is mostly going to be factual
11 information. And that is why the head of the department is
12 supposed to come in and look at these documents and say, here
13 are specific portions in here. Right? I have looked at these
14 interview notes, and here are a couple of lines that I think
15 get into our methods. And we don't want to disclose that. But
16 here is the factual information. And it hasn't been done.

17 And I -- Mr. Tyson is right. We have a deposition on
18 Tuesday. But they have had years in discovery to deal with
19 this, including several months with multiple rounds of briefs.

20 So at this point, I would just encourage the Court to
21 do what the court did in *Navarro* and let's get the documents.

22 THE COURT: Well, I think there is another option
23 which is simply if the State can't do it by Tuesday to delay
24 the deposition -- to -- we have a lot of stuff going on here.
25 So the alternative is simply to -- they need to do a proper --

1 I think they need to do the log as in -- and assert the
2 privilege in the way set forth in the Middle District case.

3 But, you know, I don't know what the -- what the
4 challenges are. I mean, I don't know whether some of the
5 documents should be made available so that we're not -- we
6 don't have endless disputes.

7 But I -- but if *Navarro's* requirements can't be met
8 by Tuesday, then you should find a different date and we're
9 just going to extend it by then.

10 I don't know -- hopefully that is not so. Because,
11 you know, didn't we all agree that I would be available to you
12 during the course of the deposition? And I have a trial
13 starting -- a criminal trial starting on Wednesday.

14 But I don't -- you know, it could resolve. It might
15 not. And I would always make my -- could make myself available
16 at lunch or at a break. But I'm not going to just simply say
17 that you get it because they failed to assert it properly.

18 Obviously these issues have been whirling for some
19 time. But this is obviously also a very significant issue to
20 the State, but very significant to the plaintiffs. And so I
21 can understand why you don't -- why the plaintiffs don't want
22 to go in there without having some of the documents or some
23 portion of the documents. And I can also understand why --
24 that the State might need more time even if it has been raised
25 for some time. But a lot has been going on, in all candor.

1 MR. TYSON: Your Honor, this is -- I'm sorry.

2 THE COURT: Go ahead.

3 MR. TYSON: I'm sorry, Your Honor. This is Bryan
4 Tyson. I just had two -- I hear you loud and clear. I just
5 had two kind of practical questions concerning trying to figure
6 out what to do here.

7 First, in terms of the log we're talking about, is
8 this a log specifically to the Coffee County breach
9 investigation? Is it a log of any election security file
10 investigation? Does it include the Spalding investigation that
11 just got opened, which I don't expect there will be a lot? I
12 just want to make sure we understand scope, Number 1, on that.

13 Number 2, on the scheduling issues, Mr. Sterling is
14 our 30(b)(6) deponent. He is the current Deputy Secretary of
15 State --

16 THE COURT: Right.

17 MR. TYSON: -- with a lot of responsibilities related
18 to the election. And just if we delay further into October,
19 we're getting into early voting, we're getting into the
20 election itself. And I just get concerned about his ability to
21 be --

22 THE COURT: Be available.

23 MR. TYSON: Have the ability to do that. To be
24 available, yes, Your Honor.

25 THE COURT: Well, there may -- frankly, I mean, I

1 don't remember precisely all of documents -- the summaries that
2 you gave me on election access. There wasn't -- it seems to me
3 most of them, as you said, were not relevant. There might have
4 been one other that was a little bit relevant. And I would
5 have to go back and look at it. And I can do that this
6 afternoon.

7 But it seems to me that -- so that it shouldn't be,
8 in fact, so hard and Tuesday would be better. But then it just
9 means -- today is Friday -- that you have got to get it -- that
10 as well as any documents or portions of documents that you're
11 preparing to issue to the plaintiffs by -- you know, by like
12 11:00 on Monday so they can have read them before -- before
13 Tuesday. I mean, Tuesday works best but --

14 MR. CROSS: Sorry, Your Honor. This is David Cross.
15 I was just going to help clarify for Bryan. It is not every
16 election security issue. It is only documents where the State
17 defendants are asserting the investigative privilege with
18 respect to allegations of unauthorized access to the system.

19 The three that we are aware of is Coffee County,
20 Fulton County, and potentially Spalding County where there is
21 information that the SullivanStrickler team may have been
22 engaged to do a similar copying there. Unclear whether that
23 happened. But that would be the more narrow focus. Documents
24 related to investigations into that type of allegation.

25 Does that help, Bryan?

1 MR. TYSON: This is Bryan. It helps a little bit.
2 But I guess that type of allegation is the problem I guess.
3 Because in terms of like us going to these files -- and y'all
4 have the summaries that kind of covered election security. Our
5 understanding, we were asserting privilege over the reports of
6 investigation, if you'll recall, associated with those
7 different investigations.

8 So I mean, if we can say like it is Coffee, Fulton,
9 and Spalding, like allegations of access into those three
10 counties, then I think that is something we can do. If it is
11 anything that might be related to a possible access, well,
12 that -- I mean, I was thinking that could include a State
13 Election Board case involving someone who left the door
14 unlocked on an EMS -- where the EMS is stored.

15 I want to make sure that we're being responsive but
16 also that we're not -- I just want to know exactly what we're
17 supposed to be producing here because I'm struggling with what
18 responses that we're responding to to be able to assert a
19 privilege, if that makes sense.

20 MR. CROSS: Yeah. What if -- what if we try to make
21 it more concrete? What if it was just limited to allegations
22 of unauthorized access to the voting equipment in Fulton,
23 Coffee, and Spalding? And the idea would be unauthorized
24 access to the voting equipment, the software, the data.
25 Something more than just somebody left the door open. Right?

1 The idea is there has been some allegation or reason
2 to believe that third-party actors who weren't allowed to have
3 access to the voting system or data -- they didn't have
4 authorization of the State -- may have come in and accessed the
5 equipment or the software or the data.

6 MR. TYSON: Okay. I think -- I think that works. I
7 just -- I think that works and helps in scope. I just don't
8 know, you know, from a timeline perspective if we can get that
9 done between, you know, noon on Friday and 11:00 on Monday as
10 far as production.

11 That gives me a scope I can work with. So I
12 appreciate that.

13 MR. CROSS: Okay. We are certainly open to moving
14 the 30(b)(6) by, you know, a period of days, not weeks, in part
15 for the reason we point out. Right? We recognize there is an
16 election coming up.

17 So if you guys want to talk and you are willing to
18 figure out what timing works, then we could revisit the
19 deposition date.

20 MR. TYSON: Okay. I think we're going to have to
21 look for -- we're going to have to figure out kind of
22 logistically -- because I don't know that, for example, we're
23 going to have a file-file that is going to have like here are
24 100 documents. That it may be here are 100 documents in a file
25 and there is a, you know, file folder in the investigator's

1 email.

2 We're just going to have to figure out how -- exactly
3 how that is stored to know what that is. But I think we can
4 work through trying to figure out what that is in a reasonable
5 time frame with that scope.

6 And then as far as the deposition goes, I think that
7 is going to depend on the Judge's availability in a lot of
8 ways, in addition to Mr. Sterling.

9 MR. CROSS: You know, one other -- I guess just to
10 throw an idea out -- always dangerous. But one thing you guys
11 might think about, Bryan, is -- and I have done this in other
12 cases with similar privilege issues.

13 If the concern is sort of producing the documents,
14 getting them out the door, to expedite things we could talk on
15 our side on whether it would be feasible for us to send someone
16 to actually do what we call a quick peek where we could look --
17 like you said, for example, say it is an investigative file of
18 100 documents. It may be that we could send someone to look
19 through those documents, identify what we think is relevant,
20 and then you would have an opportunity to say, well, we're
21 going to assert the privilege over that or we're going to
22 redact it.

23 Just an idea to think about that might -- you would
24 be preserving all your privilege rights. We would shoulder at
25 least some of the initial review to maybe expedite things.

1 Just an idea.

2 MR. TYSON: We'll have to talk to the Secretary's
3 office on that. I don't know what their parameters are. So
4 we'll check. Yeah.

5 THE COURT: Well, if anything materializes on my
6 criminal case, I'll let you know. But I'm not totally hopeful.
7 So, you know, things can happen at the last moment.

8 And the only other suggestion I have for you about
9 that in terms of schedule is there is always the evening. And
10 I mean, it is not pleasant but there is also -- there is always
11 doing it on a Saturday or something like that.

12 So all right. Well, it seems like we have gone as
13 far as we can go. And once counsel gets to talk -- defense
14 counsel gets to talk with the Secretary's office and among
15 yourselves about how much work this involves -- it may not be
16 that much work because I don't know how many documents there
17 are.

18 It may be you are just going to begin at noon rather
19 than at 9:00 and it will just go later in the day on Tuesday.
20 That is not a problem for me. And if you need to shift your
21 times around, y'all discuss that a little bit. You know, you
22 may be able to do it on Tuesday too. Just start later and go
23 later.

24 But, anyway, you-all know how to do that. You know
25 how to reach me. And apologies for running a little bit late.

1 Is there anything else we need to address?

2 MR. CROSS: No, Your Honor.

3 MR. TYSON: This is Bryan Tyson for the State.

4 THE COURT: Go ahead --

5 MR. TYSON: I'm sorry. Go ahead.

6 THE COURT: -- Mr. Tyson.

7 MR. TYSON: I was just going to raise, Your Honor, I
8 think we had referenced to in regards with Mr. Brown
9 separately. We're just trying to make sure we complete the CGG
10 supplemental production. I think that was the only other thing
11 we had on our list. We can raise that with Mr. Brown if we
12 need to.

13 THE COURT: Okay. Once you-all determine what the
14 schedule would be or how you are proceeding, would somebody let
15 me know? Let us know. Write Mr. Martin so that we can make
16 appropriate adjustments.

17 MR. TYSON: Yes, Your Honor.

18 MR. CROSS: Thank you, Your Honor.

19 THE COURT: All right.

20 MR. BROWN: Thank you, Your Honor.

21 THE COURT: All right. Bye-bye.

22 **(The proceedings were thereby concluded at**
23 **11:29 AM.)**

24

25

C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 32 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 30th day of September, 2022.

Shannon R. Welch

SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
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